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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 863.

THE CITY OF NEW YORK,

Petitioner,

—against—

MICHAEL FEIRING, Trustee in Bankruptcy of National Studios, Inc.

BRIEF OF RESPONDENT MICHAEL FEIRING, TRUSTEE IN BANKRUPTCY OF NATIONAL STUDIOS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BENJAMIN SIEGEL,
Attorney for Michael Feiring, Trustee in Bankruptcy of National Studios, Inc., Respondent.

On the Brief:
BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN.

THE COURT PRESS, N. Y. C.

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The decision below is neither in conflict with applicable local law, nor is it in conflict with the decision of any other Circuit Court of Appeals on the same matter, and this case therefore presents no reason for the issuance of a writ of certiorari.

The Case Below.

In the Court below, the respondent herein contended as follows:

1. That under Section 64 of the Bankruptcy Act, as amended by 52 Stat. 840 (known as the Chandler Bill), *debts* owing to persons entitled to priority under the laws of the State are no longer entitled to priority in bankruptcy unless specifically granted by

the Bankruptcy Act and therefore, if the claim of the City is *qua* debt and not *qua* tax, it is not entitled to priority under the Bankruptcy Act, as amended.

2. That the claim of the City against a vendor is *qua* debt and not *qua* tax and the previous holding of the Circuit Court of Appeals (2nd Circuit) to that effect in *Matter of Lazaroff*, 84 Fed. (2d) 982, was not overruled by this court in its reversal of the *Lazaroff* case. (In the *Lazaroff* case certiorari was denied *sub nom., City of New York* v. *Goldstein*, 299 U. S. 583, but subsequently this court reversed 299 U S. 522, upon the authority of *Matter of Atlas Television Co.*, 273 N. Y. 51.)

3. That the subsequent interpretation of the City Sales Tax Law and of the *Atlas Television* case (*supra*) by the New York courts, and by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and in briefs heretofore submitted by petitioner herein, confirms respondent's contention that the tax is imposed upon the purchaser and not the vendor, whose obligation to the City is that of a tax collecting agent, as distinguished from a taxpayer.

The City of New York does not dispute that the amendment of Section 64 of the Bankruptcy Act nullifies the priority heretofore granted to debts entitled to priority by the laws of the State, and therefore the City is entitled to priority under the Bankruptcy Act only if its claim is *qua* tax and not *qua* debt.

POINT ONE.

There is no conflict with applicable local decisions.

The decision of the Circuit Court of Appeals in this case is not in conflict with the applicable local decisions and does not contravene the nearest applicable decisions in the highest court of the State and is not in conflict with *Matter of Lazaroff*, 84 Fed. (2d) 982 as reversed in 299 U. S. 522.

The issue as to whether the claim of the City was *qua* tax or *qua* debt was first determined by the Circuit Court of Appeals in *Matter of Lazaroff*, 84 Fed. (2d) 982. That case was decided prior to the amendment of Section 64 of the Bankruptcy Act (Chandler Bill). The Circuit Court denied priority and expressly held that the obligation was not a tax, nor such a debt which was entitled to priority by State Law, because the City of New York was not vested with the powers of a sovereign.

Certiorari in the *Lazaroff* case was denied (299 U. S. 583) but subsequently this Court granted a petition for re-hearing and in a *per curiam* opinion (299 U. S. 522) stated as follows:

> "January 18, 1937. *Per Curiam*: The motion for leave to file a petition for rehearing is granted. The order heretofore entered on October 26, 1936, denying the petition for writ of certiorari herein is vacated, and the petition for writ of certiorari is granted. The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. *Re*: *Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94 (decided December 31, 1936)."

The *Atlas Television* case arose in the State court in an assignment proceeding for the benefit of creditors. The City there urged as it did in the *Lazaroff* case that its claim for sales tax against the vendor was entitled to priority under the laws of the State of New York by virtue of its alleged sovereign powers in the exercise of the authority granted to it by the State, and also because it was a tax.

The New York Court of Appeals found that the equities in the case warranted granting priority to the City but in granting such priority, the Court did not squarely determine that it did so because the obligation was a tax, but merely held that the City was entitled to priority regardless of whether the obligation be characterized as a tax or a debt because even as a debt the City was entitled to priority as it was exercising a function of the State under authority of the State, and in its opinion, stated as follows:

(Page 57)

> "Whether the city is entitled to a priority depends upon whether its claim is that of the sovereign people, acting through the agency of the city, or is that of the city acting as a semi-private municipal corporation. Taxation is an attribute of sovereignty and the city acts as sovereign when it imposes an obligation upon its inhabitants to contribute to the expenses of government and when it collects that obligation. That is true no less if we denominate the obligation by some other term than 'tax', so long as it constitutes an obligation created by the sovereign to contribute to the expense of government. Distinctions resting solely in words should carry

here no legal consequences. We must look to the substance of the obligation."

(Page 58)

"* * * Though the vendor is required, at least in most cases, to collect the tax from the purchaser, 'for and on account of the City', the purpose of that provision is to place the incidence of the tax immediately on the consumer."

Had the Court of Appeals intended to decide that the claim of the City was for a tax as distinguished from a debt, it could have readily said so in unequivocal language, but this the Court did not do.

The subsequent reversal of the *Lazaroff* case by this Court was not therefore a determination that the obligation of the vendor was a tax, but we respectfully submit was only intended to follow and conform to the law of the State of New York enunciated by the New York Court of Appeals that the obligation of the vendor as a debt was entitled to priority under the laws of the State of New York, and therefore entitled to priority under the Bankruptcy Act then in force.

The foregoing interpretation of the effect of the reversal of the *Lazaroff* case, is supported by an examination of the petition which The City of New York submitted to this Court when it requested a re-hearing of the *Lazaroff* case. In that petition in referring to the *Atlas Television* case, it urged as follows:

"Your petitioner desires to point out, moreover, that even if the decision of a State Court on whether a claim is or is not a tax be deemed

not binding on the Bankruptcy Court, still the decision of the State Court that the City is 'a person who by the laws of the States * * * is entitled to priority' is very definitely binding on the bankruptcy court by 64(b) (7) of the National Bankruptcy Act."

It thus clearly appears that in its renewed application for certiorari, the City of New York urged a reversal on the ground, either that the obligation was a tax due and owing by the bankrupt, or was a debt which the New York Court of Appeals in the *Atlas Television* case held was entitled to priority under the laws of the State.

Respondent's contention that the tax is imposed upon the purchaser and not the vendor, is further supported by recent opinions of the New York Court of Appeals and by this Court in the following cases:

Matter of Kesbec, Inc. v. *McGoldrick,* 278 N. Y. 293;
Matter of Merchants Refrigerating Co. v. *Taylor,* 275 N. Y. 113;
McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33.

In *Matter of Kesbec, Inc.* v. *McGoldrick* (*supra*), the Court in interpreting the City Sales Tax Law stated, as follows:

(Page 297)

"* * * The sales tax was not imposed on the vendor. It fell upon the purchaser (*Matter of Merchants Refrigerating Co.* v. *Taylor,* 275 N. Y. 113, 124) * * *"

In *McGoldrick* v. *Berwind-White Coal Mining Co.* (*supra*), this Court sustained the constitutionality of the City Sales Tax Law and stated, as follows:

(Page 43)

"* * * Another clause of Section 2 commands that the tax 'shall be paid by the purchaser to the vendor for and on account of the City of New York'. By the same clause the vendor who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city.

. . . . . .

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. * * *"

(Page 44)

"The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts (*Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94, 34 Am. Bankr. Rep. (N. S.) 7; *Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 9 N. E. (2d) 799; *Kesbec* v. *McGoldrick*, 278 N. Y. 293, 16 N. E. (2d) 288, 119 A. L. R. 536)."

The appendix attached to the petition for certiorari does not set forth the complete text of the Local Law here involved and sections 1, 2, and 10 to 18 inclusive are omitted. Section 10 of the said Local Law, which governs an application for a refund of the tax, conclusively proves that the tax is imposed

upon the purchaser and not the vendor, and said section reads as follows:

> "Sec. 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. *Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made.*" (Italics ours.)

It is significant that the statute provides that the application for the refund may be made by "the person upon whom such tax was imposed or by the vendor * * * if such vendor establishes * * * that he has repaid to the purchaser the amount for which application for refund is made".

The only interpretation of such language is that the tax is imposed upon a person other than the vendor, and the New York Courts have so interpreted the statute, holding that the taxpayer is the purchaser and that the vendor is only a tax collector.

This was clearly held in *Socony-Vacuum Oil Co. Inc.* v. *City of New York,* 247 App. Div. 163, aff'd 272 N. Y. 668, wherein Mr. Justice Dore rendered the unanimous decision for the Appellate Division, and stated:

(Page 167)

> "The precedents cited by the city are readily distinguishable. They relate to remedies available to the *taxpayer,* whereas these plaintiffs are,

in truth, tax collectors, as the tax is assessed on and paid by the ultimate purchaser."

A similar conclusion was reached in *Matter of Kesbec* v. *McGoldrick* (*supra*). In that case a vendor had collected a sales tax based upon a formula furnished by the Comptroller and after collecting such tax paid the same to the Comptroller. The formula adopted by the Comptroller was thereafter declared illegal and upon a recomputation of the sales tax it appeared that the vendor had collected a sum in excess of the proper amount of the tax, and the vendor thereupon instituted a proceeding to recover the excess tax from the Comptroller to whom the vendor had paid the same.

The City resisted such application and in its brief urged that *the vendor was only a tax collector,* and by reason thereof was not the proper party to bring such a proceeding, as only a *taxpayer* could bring such a proceeding.

The Court of Appeals accepted the argument of the City and refused to return to the vendor the tax which the vendor had illegally collected and paid to the Comptroller, because the tax was not imposed upon the vendor but upon the purchaser, and held that the purchaser who was the taxpayer was the one who could apply for the refund.

If the vendor is a taxpayer, as the City now urges, then certainly the vendor would be entitled to an unconditional refund of a tax erroneously paid by him to the Comptroller, but this has been denied to the vendor both by the statute and the interpretation thereof by the New York Courts.

The case of *Queens Vending Corp.* v. *City of New York,* 94 N. Y. L. J. 318 (July 31, 1933), aff'd 246

App. Div. 594, cited by petitioner at page 15 of its brief herein, has no application, and does not conflict with the decision in this case, because in that case the issue was not raised as to whether the liability of the vendor was *qua* tax or *qua* debt. The court there merely determined that where the Comptroller pursuant to Section 3 of the Sales Tax Law, had fixed a price below which the vendor need not collect the tax from the purchaser, that the failure of the vendor to collect such tax from the purchaser on sales below such price, did not violate that portion of the Sales Tax Law which made it unlawful for the vendor to absorb the Sales Tax.

Matter of David Brown Printing Co. Inc., 285 N. Y. 47, cited by petitioner at page 18 of its brief, likewise did not decide whether the claim of the City of New York was *qua* tax or *qua* debt because such issue was not there involved. That case merely determined that in a proceeding arising in the State Court where an assignment for the benefit of creditors had been made, that the claim of the City for sales tax was on the same parity as the claim of the State of New York for franchise tax, upon the theory that both claims depend upon the same sovereign right and that the City was acting as the agent for the State. On the same day which the Court of Appeals rendered its decision in *Matter of David Brown Printing Co. Inc.* (*supra*) it affirmed *Matter of Torpedo Dress*, 285 N. Y. — (March 6, 1941) which held that a claim of the State of New York for unemployment insurance taxes is entitled to priority over the claim of the City for sales tax, thus negativing the implication that the claim of the City is one for taxes entitled to the same parity as all taxes imposed by the State.

Jensen Candy Co. v. *State Tax Commission,* 90 Utah 359, cited at page 15 of petitioner's brief, although not of local origin, nevertheless has no application because an examination of the opinion in that case discloses that the issue as to whether the obligation was a tax or a debt was not considered and the statute there involved is substantially different than the one at bar.

It conclusively appears from the foregoing that there is no conflict with the local decisions which have all held that the tax is imposed upon the purchaser and not the vendor.

POINT TWO.

The position now taken by petitioner is in direct conflict with its position heretofore taken before this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33.

In the footnote at page 5 of the petition for certiorari herein, the City states:

> "As we show *post,* p. 19, we are not in any sense going back on the position we took at the bar of this court in the *Berwind-White* case."

We have carefully examined the brief submitted by the City in the *Berwind-White* case and are respectfully of the opinion that the City is definitely going back on the position which it took before this court in the *Berwind-White* case and is now taking a diametrically opposite view.

To support our contention we quote the following excerpt from the brief heretofore submitted by the

City of New York to this court in the *Berwind-White* case:

(At page 7 of Brief)

"The tax is imposed not on the seller but on the buyer. The statute makes this abundantly clear and the courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938).

The statute provides that the tax is payable 'by the purchaser to the vendor, for and on account of the City of New York' (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has 'the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service' (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2)."

(At page 43 of Brief)

"B. THE TAX IS IMPOSED NOT UPON THE SELLER BUT UPON BUYERS LOCAL TO NEW YORK WHO CANNOT BE TAXED IN ANY OTHER STATE.

Quite apart from the local nature of the taxable event, there is another reason why this tax

cannot be imposed in more than one state. The taxpayer is not the seller, but the local purchaser."

The foregoing statements were made by the City of New York in its brief in the *Berwind-White* case filed in this Court, and the position taken therein was followed by this Court when it sustained the constitutionality of the City Sales Tax, basing its opinion upon the fact that the tax as such was imposed on the purchaser and not the vendor, and that therefore there was no interference with interstate commerce.

Mr. Chief Justice Hughes dissented from the majority opinion of this Court because he rejected the argument of the City that the tax was upon the purchaser and stated in his dissenting opinion as follows:

(Page 61)

"If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser."

This dissenting opinion emphasizes in bold relief the force of the majority opinion in holding that the tax was imposed on the purchaser and not the vendor, and that the City of New York is now taking a position entirely inconsistent with and diametrically opposed to that taken by it in the *Berwind-White* case.

To now hold that the tax is imposed upon the vendor would be inconsistent with the decision of this Court in the *Berwind-White* case, and would cast doubt upon the decision of this Court declaring the City Sales Tax Law to be constitutional.

Any doubt as to the constitutionality of the act would render greater damage to the City of New York, than a reversal of the decision of the Court below in this case. Public policy does not require such reversal.

POINT THREE.

There is no conflict with the decision in the Tenth Circuit in *Barbee* v. *Oklahoma Tax Commission*, 103 F. (2d) 114.

The decision of the Circuit Court of Appeals in the case below does not conflict with the decision in the Tenth Circuit in *Barbee* v. *Oklahoma Tax Commission* (*supra*) and we advance two reasons therefor as follows:

I.

The first reason is that *Barbee* v. *Oklahoma Tax Commission* (*supra*) was decided under the Bankruptcy Act as it existed prior to its amendment, whereas the instant case was decided under the statute as amended.

The opinion of the District Court in *Barbee* v. *Oklahoma Tax Commission* (reported *sub nom. Matter of Kanaly*, 23 F. Supp. 995, 37 A. B. R. (N. S.) 588) quotes the section of the Bankruptcy Act under which the claim of priority was made in that case as follows:

> "The section of the Bankruptcy Act under which the claim for priority is asserted by the tax commission in this case is section 64, 11 U. S.

C. A. Sec. 104, and the relevant parts of such section are quoted as follows:

> '(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof. * * * The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (7) debts owing to any person who by the laws of the states or the United States is entitled to priority: Provided, That the term "person" as used in this section shall include corporations, the United States and the several states and territories of the United States.'
>
> The question for determination is whether or not the claim for taxes, collected by the vendor, under the Bankruptcy Act, *constitutes a debt which is entitled to priority.*" (Italics ours.)

The foregoing language is the language of the Bankruptcy Act prior to its amendment under the Chandler Bill. The amended statute omits the words "the states or" and the amended section is now contained in Section 64, subdivision 5, of the Bankruptcy Act, reading as follows:

> "Debts owing to any person including the United States, who by the laws of the United States is entitled to priority * * *."

The issue, therefore, which was decided in *Barbee* v. *Olkahoma* (*supra*) was not whether the claim of the State of Oklahoma was a tax, but as the District Court there said whether the claim *"constitutes a debt which is entitled to priority"*.

II.

The second reason is that the Oklahoma Sales Tax Law (Section 3, article 7, chapter 66, Session Laws 1935) expressly defines who is the taxpayer, as follows:

> "The term 'taxpayer' shall mean any person liable for any tax hereunder."

In the instant case, the New York statute does not define the term "taxpayer". However, the statute has been construed both by the New York courts and by this very petitioner as making the purchaser the taxpayer and the vendor only a tax collector.

POINT FOUR.

Whether a state statute which creates a tax does in fact constitute a tax within the meaning of the Bankruptcy Act is a Federal question to be determined by the Bankruptcy Court.

One of the questions which the City presents in its petition for certiorari is as follows (p. 7):

> "(2) Was the Circuit Court of Appeals warranted in rejecting the authority of decisions of the New York Courts defining the retailer's obligation in the premises as a tax?"

We respectfully submit that the New York Courts have not defined the vendor's obligation as a tax, and the Circuit Court has not therefore rejected the authority of the New York cases.

Assuming *arguendo*, that the Circuit Court had rejected such authority, we submit that such re-

jection is proper because whether a state statute which creates a tax does in fact constitute a tax within the meaning of the Bankruptcy Act is a Federal question to be determined by the Bankruptcy Court.

The principle long established in *Swift* v. *Tyson,* 16 Pet. 1, 10 L. ed. 865, that the Federal Court is not bound to follow the law of the State was recently overruled by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, wherein this court held that the Federal Court was bound to follow the law of the State on all questions, *except* in matters governed by the Federal Constitution or by the Acts of Congress, and Mr. Justice Brandeis who delivered the opinion for the Court stated at page 78, as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

The instant case involves the interpretation of an Act of Congress because the City is seeking priority not by virtue of any State law but by reason of a claim asserted under the Acts of Congress relating to bankruptcy.

Under Section 64a (4) of the Bankruptcy Act, the amount and legality of tax claims must be determined by the Bankruptcy Court, and in *New Jersey* v. *Anderson,* 203 U. S. 483, this Court interpreted this section, as follows:

(Pages 491 and 492)

> "* * * a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law

providing for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this Court."

Regardless of the interpretation of the *Atlas Television* case, the issue whether the tax imposed by the City Sales Tax Law does in fact constitute a tax upon a vendor within the meaning of the Bankruptcy Act giving preference to taxes, is a Federal question to be determined exclusively by the Federal Court, and the determination of the State Court with respect thereto is not conclusive in that respect.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

BENJAMIN SIEGEL,
Attorney for Michael Feiring, Trustee in Bankruptcy of National Studios, Inc., Respondent.

On the Brief:
BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN.

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